Proposed Rules

Federal Register
Vol. 76, No. 247
Friday, December 23, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 534

RIN 3206–AL88

Pay for Senior-Level and Scientific or Professional Positions

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) proposes to amend rules for setting and adjusting pay of senior-level (SL) and scientific or professional (ST) employees. The Senior Professional Performance Act of 2008 changes pay for these employees by providing for rates of basic pay up to the rate payable for level III of the Executive Schedule (EX–III), or, if the employee is under a certified performance appraisal system, the rate payable for level II of the Executive Schedule (EX–II). Consistent with this statutory emphasis on performance-based pay, these regulations will provide for agencies to set and adjust pay for SL and ST employees based on individual performance, contribution to the agency's performance, or both, as determined under a rigorous performance appraisal system.

DATES: OPM must receive comments on or before February 21, 2012.

ADDRESSES: You may submit comments, identified by ''RIN 3206–AL88,'' by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E- mail: sespolicy@opm.gov. Include ''RIN 3206–AL88'' in the subject line of the message.

Fax: (202) 606–2548.

Mail, Hand Deliver/Courier comments: Mr. Stephen Shih, Deputy Associate Director for Executive Resources and Employee Development, Room 7412, 1900 E Street NW., Washington, DC 20415–9700.

FOR FURTHER INFORMATION CONTACT: William Collins by telephone at (202) 606–1642, by FAX at (202) 606–2548, or by email at *william.collins@opm.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing proposed regulations to revise the rules that govern pay setting for senior-level (SL) and scientific or professional (ST) employees. The proposed regulations conform to amendments made by section 2 of the Senior Professional Performance Act of 2008 (Pub. L. 110–372, October 8, 2008), hereafter referred to as the ''Act.'' Section 2 of the Act amends provisions in 5 U.S.C. chapter 53 relating to the SL/ST pay system and locality rates. These amendments became effective on the first day of the first pay period beginning on or after April 6, 2009—*i.e.,* April 12, 2009.

The changes made by the Act and these proposed regulations are designed to bring the pay system for SL and ST employees more in line with the pay system for the Senior Executive Service (SES). The Act raises the maximum rate of basic pay in the SL/ST pay range from the rate for level IV of the Executive Schedule (EX) to the rate for EX–III ($165,300 in 2010). The minimum rate of basic pay in the new SL/ST pay system continues to be 120 percent of the minimum rate of basic pay payable for GS–15 ($119,554 in 2010).

The amended 5 U.S.C. 5376 allows an agency to establish a higher maximum rate of basic pay in the SL/ST rate range, equal to the rate for EX–II ($179,700 in 2010), if the agency obtains the certification under 5 U.S.C. 5307(d) of its performance appraisal system for employees in SL or ST positions. A certified SL/ST appraisal system makes meaningful distinctions based on relative performance. In addition, agencies that obtain such certification must apply to their SL and ST employees a higher aggregate limitation on pay under 5 U.S.C. 5307(d) that is equivalent to the total annual compensation payable to the Vice President ($230,700 in 2010). (The legislation authorizing the higher aggregate limitation was enacted in 2002.) The regulations prescribing the substantive and procedural requirements that an agency must meet to receive such certification for these purposes are in 5 CFR part 430, subpart D.

The Senior Professional Performance Act of 2008 and the later Non-Foreign Area Retirement Equity Assurance (AREA) Act (as contained in the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84, October 28, 2009)) both amended 5 U.S.C. 5304 concerning locality-based comparability payments for SL and ST employees. The Senior Professional Performance Act of 2008 removed all SL and ST positions from the list of positions for which locality-based comparability payments may be extended. However, the Non-Foreign AREA Act subsequently authorized extending locality pay to only those SL and ST employees whose official worksite was in one of the nonforeign areas listed in 5 CFR 591.205 on one specific date, January 2, 2010. Therefore, those SL and ST employees whose official worksites were in nonforeign areas on January 2, 2010, are entitled to receive the locality pay rate for that area, subject to the applicable locality rate cap established by 5 U.S.C. 5304(g)—*i.e.,* EX–II if the employee is covered by an appraisal system certified under 5 U.S.C. 5307(d), or EX–III if not so covered—and other provisions of the Non-Foreign AREA Act. Employees who are assigned to vacant SL or ST positions in the nonforeign areas on or after January 3, 2010, are not eligible for locality payments. Employees in SL or ST positions in the continental United States are also not authorized to receive locality pay on or after April 12, 2009 (the effective date of section 2 of the Senior Professional Performance Act of 2008). We issued conforming changes to the locality pay regulations at 5 CFR part 531, subpart F, to reflect the most recent amendments to 5 U.S.C. 5304(h) on June 7, 2011. (See 76 FR 32859.)

Conversion to the New SL/ST Pay System

Consistent with section 2(d) of the Act, agencies converted SL and ST employees to the new SL/ST pay system on April 12, 2009. OPM issued guidance to agencies addressing this conversion in Compensation Policy Memorandum 2009–06 on April 2, 2009. An SL or ST employee's converted rate of basic pay was the employee's former rate of basic pay, plus any applicable locality pay, in effect on April 11, 2009. For example,

on April 11, 2009, an SL employee who was at the maximum of the SL/ST rate range and had an official worksite in a locality pay area received a rate of basic pay of $153,200 (*i.e.,* EX–IV) and a locality payment of $9,700 for a total rate of $162,900. (The difference between the rate for EX–III and EX–IV was $9,700; EX–III was the cap on locality rates for SL and ST employees on April 11, 2009.) The SL employee's converted rate of basic pay was set at $162,900 on April 12, 2009. The newly converted SL or ST rate became the SL or ST employee's rate of basic pay for all pay computation purposes, and the existing pay plan codes ''SL'' for senior-level employees and ''ST'' for scientific or professional employees were retained.

Since conversion was mandated by section 2(d) of the Act, individual conversion actions were effected without regard to conflicting provisions of 5 CFR part 534, subpart E. For example, the new EX–III pay maximum established under section 2(b) of the Act overrode the conflicting EX–IV pay maximum in 5 CFR 534.502(b). The statutory requirement for conversion on April 12, 2009, overrode the 12-month limit on pay adjustments in 5 CFR 534.503(c). However, regulatory provisions not in conflict with the new statute continued in force. For example, since the 12-month limit in 5 CFR 534.503(c) did not contain an exception for pay adjustments due to conversion under section 2(d) of the Act, most conversion pay adjustments initiated a new 12-month waiting period for affected SL and ST employees.

Certain SL and ST employees had an official worksite on April 11, 2009, that was outside the 48 contiguous States and the District of Columbia: *i.e.,* their worksites were overseas or in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, or another U.S. territory or possession where locality pay was not authorized. These employees converted to the new SL/ST pay system at their rate of basic pay (exclusive of any locality rate of pay) on April 12, 2009. Since their rate of basic pay did not change, the conversion did not initiate a new 12-month limit for those employees.

Rules for the New Pay System

Congress first provided for certification of performance appraisal systems under section 1322 of Public Law 107–296, the Homeland Security Act of 2002 (November 25, 2002), and applied it to both SES and SL/ST performance appraisal systems. Upon certification, an agency could apply a higher aggregate pay cap, *i.e.,* the Vice President's salary rather than level I of the Executive Schedule, to an SES, SL or ST employee covered by the certified appraisal system. Subsequently, under section 1125 of Public Law 108–136 (November 24, 2003), Congress established the open range SES pay system with maximum pay caps of EX–III or EX–II, depending on whether a performance appraisal system is certified, and provided that a senior executive's pay shall be based on individual performance, contribution to the agency's performance, or both.

To implement the congressional design, OPM and OMB jointly published interim regulations at 5 CFR part 430, subpart D, and part 1330, subpart D, to govern certification of agency appraisal systems as making meaningful distinctions based on relative performance. (See 69 FR 45548.) Certification was based on nine criteria identified in 5 CFR 430.404(a)(1) through (9), notably including performance differentiation and pay differentiation, such that senior employees (*i.e.,* SES, SL or ST) who demonstrate the highest levels of individual performance and/or contribution to the agency's performance receive the highest annual summary ratings or ratings of record, as applicable, as well as the largest corresponding pay adjustments, cash awards, and levels of pay. The same criteria were to be applied in certifying SES appraisal systems and SL/ST appraisal systems.

Under the Senior Professional Performance Act of 2008, Congress now also makes higher rates of basic pay available to SL and ST employees based upon the certification of performance appraisal systems. Congress does so without stating directly, as the SES statute does, that pay for SL and ST employees is to be based on individual performance, contribution to the agency's performance, or both (compare 5 U.S.C. 5376(b) with 5 U.S.C. 5382). The legislative history stated the principal purpose of the underlying bill is to bring the pay system for SL and ST personnel into line with that for SES members by eliminating locality pay and authorizing an agency to use a level III or level II pay ceiling, depending upon whether the agency appraisal system is certified. S. Rep. No. 110–328, 110th Cong., 2nd Sess. (April 22, 2008). Given the context of certification, as implemented by OPM and OMB, and the SES pay rules, OPM concludes that SL and ST pay should also be based upon individual performance, contributions to the agency's performance, or both. We propose to regulate accordingly.

The pay system established at 5 U.S.C. 5376 by the Federal Employees Pay Comparability Act of 1990 (FEPCA), Public Law 101–509 (November 5, 1990) did not impose a 12-month restriction on pay adjustments for SL and ST employees, even though 5 U.S.C. 5383 imposed a 12-month restriction on SES pay adjustments that could not be waived. OPM initially planned to let each agency decide whether to impose a similar limit on pay adjustments for SL and ST employees; however, all but one of the agencies we consulted recommended establishing a 12-month limit by regulation. Accordingly, OPM imposed a 12-month restriction on the SL/ST pay system consistent with the SES pay rules. Then, in establishing the open range SES pay system that became effective for most senior executives on January 11, 2004, Congress continued the 12-month restriction for senior executives but authorized OPM to provide for exceptions by regulation.

OPM is now proposing to remove the current regulatory 12-month restriction on pay adjustments for SL and ST employees because Congress has revised the SL/ST pay system and again has not imposed such a restriction. On April 12, 2009, more than 60 percent of SL and ST employees converted to the new SL/ST system with a basic pay rate equal to EX–III because their rates of basic pay plus locality pay as of April 11, 2009, were equal to the EX–III maximum permitted under the former pay system. In place of the 12-month rule, we propose new rules that require the following: (1) Determining SL and ST pay adjustments based on individual performance, contributions to the agency's performance, or both; (2) for agencies with ten or more senior professionals, centralized review of proposed pay adjustments; and (3) approval of the highest level SL and ST pay adjustments and of off-cycle pay adjustments under proposed 5 CFR 534.510 by the agency head or the designee who oversees the performance-based pay system.

Under section 5376(b)(2), an agency head is still required to adjust rates of basic pay for SL and ST positions as the agency head considers appropriate at the same time statutory pay adjustments are provided for the General Schedule, which is not required for SES positions. Currently, OPM does not restrict the amount of this adjustment but provides that an annual adjustment that exceeds the higher of the adjustments proposed for the General Schedule (GS) or EX pay systems is a pay adjustment for purposes of the 12-month restriction.

OPM now proposes to eliminate the 12-month restriction.

The date specified in law for the annual adjustment, *i.e.,* the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. 5303 in the rates of basic pay under the General Schedule, usually coincides with adjustments in Executive Schedule pay rates and is regularly used by most agencies to provide performance-based pay increases for appraisal periods ending on or about September 30 of the preceding year. OPM therefore proposes in 5 CFR 534.505(b) that each agency must include in its written procedures a requirement to adjust each SL or ST employee's pay under proposed 5 CFR 534.507(b), which would prescribe rules for performance-based pay increases, on the date specified by 5 U.S.C. 5376(b)(2).

Definition of Terms

Our proposed definition of ''agency'' in 5 CFR 534.503 reflects that under 5 U.S.C. 5108 OPM determines the maximum number of SL positions that may be established in an Executive agency, and under 5 U.S.C. 3104 OPM determines the maximum number of ST positions in any agency, except for the Library of Congress, which also may establish eight ST positions under 5 U.S.C. 3104. The definitions ''SL employee'' and ''ST employee'' do not include incumbents of SL-equivalent or ST-equivalent positions established or compensated under other statutory authority. We consider this necessary because OPM lacks authority to regulate the pay system for such employees who are not compensated under 5 U.S.C. 5376.

OPM is proposing to define the term ''authorized agency official'' in 5 CFR 534.503 as meaning the agency head or an individual authorized to act for the agency head in the matter concerned. These officials are to be defined in written procedures established by an agency under 5 CFR 534.505. We are also proposing restrictions on who may be delegated authority to take certain pay actions under 5 CFR 534.505(c) and 5 CFR 534.506(c).

We propose to define ''certified'' as having the certification that OPM, with OMB concurrence, provides to a performance appraisal system that makes meaningful distinctions based upon performance. This means that when OPM suspends a performance appraisal system certification, that system is ''not certified'' (also defined in 5 CFR 534.503) for as long as the suspension continues. Under proposed regulations at 5 CFR 534.507(d), any rating of record or performance rating must cover a period of performance lasting at least 90 days during which the applicable performance appraisal system is certified in order to support an increase to a rate of basic pay above level III but equal to or below level II of the Executive Schedule. A suspension could therefore affect an agency's ability to grant such pay increases on a timely basis.

We propose to define the term ''movement'' to include any assignment from one SL or ST position to another SL or ST position, whether within or between the competitive and excepted services or within or between agencies, provided that the applicable requirements for the specific assignment are met. Within this broader category, the term ''transfer'' is more narrowly defined to mean any movement that is a change of a senior professional employee from an SL or ST position in one agency to an SL or ST position in another agency without a break in service of at least 1 full workday. We define ''transfer'' separately to clarify circumstances under which 5 CFR 534.509(a) requires preserving a rate of basic pay above EX–III but less than or equal to EX–II. If the movement is between agencies without a break in service of at least 1 full workday, it does not matter whether the senior professional position to which the individual transfers is SL or ST or whether it is in the competitive service or excepted service.

We propose to define the term ''performance management system'' to include, in addition to an agency's performance appraisal system for SL and ST employees, other disciplines and activities by which the agency implements performance management. As described in 5 CFR 430.102, performance management is the systematic process by which an agency involves its employees, as individuals and members of a group, in improving organizational effectiveness in the accomplishment of agency mission and goals. This includes processes required to address the criteria for certification of a performance appraisal system defined in 5 CFR 430.404(a)(1) through (9). It also includes development of an agency's Strategic Human Capital Plan and may include other processes used by an agency to define and address its performance requirements. Performance appraisal does not occur in isolation but within the broader context of performance management activities by which an agency identifies, prioritizes, defines, measures and values work to be done and results to be achieved. Our proposed regulations are based on the assumption that an agency developing pay policies and criteria and determining pay adjustments does so within that broader context.

Setting Pay Upon Appointment to a New SL or ST Position

The proposed regulations in 5 CFR 534.506 treat pay setting separately from pay increases and include, in addition to pay setting for an individual upon initial appointment to an SL or ST position, pay setting for a current SL or ST employee upon transfer to a new agency and pay setting upon reappointment or reinstatement of a former SL or ST employee to an SL or ST position in any agency. Consistent with the SES pay rules, we provide that an agency must consider the nature and quality of the individual's experience, qualifications and accomplishments as they relate to requirements of the senior professional position and its impact on the agency's performance, with pay rates above EX–III but equal to or below EX–II being reserved to those individuals who possess superior competencies necessary to address key program and mission requirements, as determined by the agency.

In general, pay may be set at any rate within the applicable rate range under 5 CFR 534.504(a). There is one exception, in that 5 U.S.C. 5376(b)(4) precludes an employee from suffering a reduction in pay by reason of transfer from an agency with an applicable appraisal system that is certified to an agency in which the applicable appraisal system is not certified. This is reflected in 5 CFR 534.506(b) and 5 CFR 534.509(a), which would require preservation of an employee's rate of basic pay above EX–III but less than or equal to EX–II in this circumstance. We are also proposing to require that an individual who leaves an agency and is reappointed to the same or a successor position in that agency within 30 days may not receive a higher rate of basic pay, unless the agency head or the designee responsible for the functions identified in 5 CFR 430.404(a)(6) determines it is warranted.

Annual Increases in Basic Pay

We are proposing a heading for 5 CFR 534.507 that refers to increases in a rate of basic pay rather than pay adjustments. References to pay adjustments could be read as including reductions in pay. Pay reductions for SL and ST positions are taken under 5 CFR part 752, subpart D. Rules in proposed 5 CFR part 534, subpart E, therefore generally relate to setting and increasing a rate of basic pay, and 5 CFR 534.508

refers the reader to 5 CFR part 752, subpart D, for reductions in pay or grade for such cause as will increase the efficiency of the service, or to 5 CFR part 432, for performance-based reductions in grade.

OPM proposes to provide that pay increases under 5 CFR 534.507(b) must be based upon individual performance, contributions to agency performance, or both, as determined by the agency under a rigorous performance management system. As under SES pay rules, rates above EX–III but equal to or below EX–II would be reserved for those senior professionals who demonstrate the highest-level performance and make the greatest contributions to agency performance.

Generally, it is our view that an SL or ST employee rated fully successful and properly positioned within the pay range should at least receive an increase that helps preserve the economic value of his or her salary. This kind of increase is often provided through annual adjustments to statutory pay systems. Accordingly, we are proposing under 5 CFR 534.507(h) that in any year in which General Schedule pay rates are increased under 5 U.S.C. 5303, an agency head who decides on a ''zero'' annual pay adjustment for a senior professional rated fully successful or above must communicate the reasons for that decision to the senior professional in writing; however, for a senior professional paid within the top 10% of the applicable pay range this communication would be required only if Executive Schedule pay rates are also increased under 5 U.S.C. 5318 and the senior professional is rated outstanding. We propose that this written communication requirement may not be construed to require a pay increase for any senior professional. OPM is not proposing an appeal right or opportunity because we understand the statute to give the agency head authority to provide the annual adjustment he or she considers appropriate. We also propose that a senior professional employee rated below fully successful may not receive a pay increase except an increase required to maintain the minimum rate of basic pay. Note that 5 CFR 451.104(a)(3) already precludes a rating-based performance award for an employee whose most recent rating of record is below fully successful.

Although the higher maximum pay cap applies only to SL or ST employees covered by a certified performance appraisal system, changes made by the Act increase every agency head's authority and discretion over SL/ST pay whether or not an applicable performance appraisal system is certified. Formerly, senior professionals given different rates of basic pay by an agency head could end up with the same total salary, *i.e.,* a rate equivalent to EX–III, due to locality pay being added up to the (EX–III) cap on basic pay plus locality pay. In effect, more locality pay was automatically added to the salaries of senior professionals with lower rates of basic pay, including senior professionals who demonstrated relatively lower levels of performance. Locality pay could have a proportionally greater impact on total salary of some senior professionals with lower rates of pay and lesser performance than it did for other senior professionals with higher rates of basic pay and greater performance. Even if an agency head could directly relate performance to basic pay, the relationship of performance to total pay was ambiguous and could only be managed indirectly. Under the new pay system, each agency head has authority over the entire SL/ST pay range and can assign each senior professional the rate of basic pay that reflects the agency head's valuation of that senior professional's service to the agency.

OPM considers the Act to call for each agency head to use this discretion to set and adjust rates based upon performance; therefore, the regulations propose the same basic rules for making and documenting pay determinations whether or not the applicable performance appraisal system is certified. OPM proposes to provide an exemption at 5 CFR 534.511 from certain provisions of the proposed regulation for any agency that makes pay adjustments for SL or ST employees or positions that are not subject to performance appraisal. The exemption applies only with respect to those employees or positions and only to the extent specific proposed regulatory provisions would require the pay-setting policy or individual pay adjustments to be based upon performance appraisal determinations. Otherwise, the regulation would apply. For example, the agency would be required to establish written procedures to govern setting and increasing pay for such employees based upon such criteria as the agency does apply, consistent with applicable statute.

Under the proposed regulations, OPM would require each agency to adjust pay, for SL and ST employees once each year based on performance, contributions to the agency's performance, or both at the time 5 U.S.C. 5376(b)(2) requires each agency head to adjust pay for SL and ST positions in the agency. We propose that an agency must document the basis for each pay increase under 5 CFR 534.507(b) by means of a current rating of record, or, in the absence of a rating of record that reflects current performance, a performance rating that covers a period of at least 90 days.

OPM is proposing to provide that a pay increase must be based upon an agency's determination about the value of an individual's characteristic and continuing service to the agency. The purpose of this provision at 5 CFR 534.507(b)(3) is to draw attention to an agency's responsibility to determine the most appropriate reward for an SL or ST employee's specific contributions, rather than making a pay increase the default option. Under 5 U.S.C. chapter 45 and 5 CFR part 451, agencies may grant an SL or ST employee an award based on a rating of record, a special act or service award, and other incentives. We propose that pay increases be reserved for such contributions as the agency considers characteristic of the employee's service on a continuing basis. While stating this as a general rule, we would expect each agency to interpret and apply it in light of patterns of work that apply for each SL or ST position. For example, the relative infrequency of extraordinary advances in a given field of work should not keep an agency from using increases in a rate of basic pay to recognize characteristic and continuous efforts, as reflected in ongoing individual performance and contributions, by which those advances are achieved and for which the agency depends upon a senior professional. Rather, the intent of this provision is to preclude escalation of pay rates by use of pay increases where other relevant statutory authorities provide more appropriate forms of reward.

Written Procedures

OPM proposes in 5 CFR 534.505 to require that each agency develop written procedures for setting or increasing SL and ST pay, including criteria and administrative and management controls that ensure pay actions conform to the statute and the requirements proposed in this subpart. Under proposed 5 CFR 534.505(b), each agency's written procedures would require rates of basic pay for SL and ST positions to be adjusted under 5 CFR 534.507 on the date statutory adjustments are made to the General Schedule. Under proposed 5 CFR 534.505(a)(5), agency controls must include a central review process for ratings assigned under 5 CFR 430.208 and pay increases proposed under 5 CFR 534.507(b). Under 5 CFR 430.403(d), some agencies already provide for an agency Performance

Review Board (PRB) to review proposed ratings and pay increases for their SL and ST employees. This practice, if documented in the agency's written SL and ST pay procedures, would meet the requirement.

In 5 CFR 534.505(a)(3), we propose that an agency identify in its written plan any criteria used to establish pay ranges applicable to different SL or ST positions (*e.g.,* tiers) consistent with determining pay based upon individual performance or contributions to agency performance. An agency could, for example, use information from its performance management system processes to develop criteria that distinguish pay ranges for SL or ST positions based upon the kinds or levels of contributions to agency performance for which those positions are accountable and place individual SL or ST positions in their respective pay ranges accordingly.

OPM also proposes that an agency head may delegate authority for SL and ST pay actions, except that only the agency head or the designee who performs the functions identified in 5 CFR 430.404(a)(6) may approve the following pay actions: (1) A pay increase resulting in a rate of basic pay within the top 10 percent of the applicable pay range; (2) a pay increase resulting in a rate of basic pay 10 percent or more above the SL or ST employee's salary at the beginning of the fiscal year, or, if more recent, upon initial appointment within the agency; (3) a pay increase upon reappointment of a SL or ST employee who is reappointed within 30 days to the same position or a successor position in the agency; or (4) an off-cycle pay increase as provided in 5 CFR 534.510. We believe top level responsibility for these pay increases is critical to achieve and maintain a reasonable distribution of rates of basic pay within the pay range. OPM is therefore proposing that authority to approve these pay actions may not be further delegated.

OPM is proposing that the head of an agency may delegate to an Inspector General (IG) authority for all pay actions for senior professionals within the Office of Inspector General (OIG). Under the Inspector General Reform Act of 2008, Public Law 110–409, October 14, 2008, an OIG is identified as a separate agency and the IG as the head of that agency for purposes of SES statutes, including pay setting under 5 U.S.C. 5382 and 5383; however, the same was not done for senior professionals. As a result, OPM has no statutory basis to treat an IG as the head of an agency for purposes of pay setting under 5 U.S.C. 5376, or to require an agency head to delegate authority for senior professional pay actions to an IG. OPM nevertheless considers such delegation as supporting the independence of the OIG by avoiding any appearance that pay actions for senior professionals could be used to influence OIG activities. OPM therefore is proposing to clarify in 5 CFR 534.505(e) that an agency head may delegate authority to an IG for all pay actions for senior professionals in the OIG, including those for which OPM proposes under 5 CFR 534.505(c) to restrict delegation to the designee who performs the functions identified in 5 CFR 430.404(a)(6). Such delegation is supported by the fact that 5 CFR 430.404(b) provides that the IG must perform those functions for all senior employees in an OIG. OPM further proposes that if an agency head delegates this authority to the IG, the agency need not count OIG senior professionals when determining whether the agency must perform the centralized review proposed under 5 CFR 534.505(a)(5).

Pay Increases After Certification of a Performance Appraisal System

The Act makes changes to the process for certifying performance appraisal systems that have significant implications for both current SES pay regulations and the proposed SL/ST pay regulations. Formerly, certification of a performance appraisal system was for a calendar year. In effect, the statute supported viewing a certification obtained after the beginning of a calendar year as implicitly covering operations under the performance appraisal system during the entire calendar year, including time elapsed prior to certification. Some agencies have relied upon this to grant pay increases above the EX–III level after certification of a performance appraisal system based upon ratings that became final before the system was certified. Under the Act, however, certification is for a period not to exceed 24 months beginning on the date of certification, unless extended by the Director of the Office of Personnel Management for up to 6 additional months. OPM considers this change to mean that certification is prospective and does not cover performance appraisal system operations prior to certification.

OPM is therefore proposing in 5 CFR 534.507(d)(1) that a rating of record or performance rating used to support a pay increase for an SL or ST employee above EX–III must cover at least 90 days of performance beginning after the date of certification. However, we are also proposing under 5 CFR 534.507(e) to provide that OPM may waive this restriction upon the initial certification of a performance appraisal system and permit an agency to use an appraisal covering time prior to certification, if OPM determines that the agency has been operating under the same performance appraisal system in a manner supporting certification for at least 90 days before certification was granted. Notification of this waiver must be in writing. This waiver would not be available upon reinstatement of a certification that has been suspended under 5 CFR 430.405(h) or upon the subsequent certification of a performance appraisal period for which a previous certification has expired.

Removal of the SES ''Certification Gap'' Provision

OPM issued a final rule at 71 FR 38753, July 10, 2006, to provide agencies with the authority to increase the rates of basic pay of certain members of the SES whose pay was set before the agency's SES performance appraisal system was certified for the calendar year. The regulation at 5 CFR 534.404(e)(2) permits an agency for which a ''certification gap'' occurs between expiration of a performance appraisal system certification at the end of a calendar year and certification of that system for the next calendar year to revisit certain pay actions that occur during the certification gap period and provide an additional increase for an affected executive, if warranted, after the system is certified. These pay adjustments may not be made effective before the new certification date. The final rule also provided at 5 CFR 534.404(c)(3)(v) that this kind of increase is not considered a pay adjustment for purposes of the 12-month rule applicable to SES pay adjustments.

We conclude that the change from calendar year certification to prospective certification removes any basis for OPM to authorize an agency to revisit and adjust pay to rates above EX–III but less than or equal to EX–II for a pay action that precedes certification. When certification was on a calendar year basis, time prior to certification but within the calendar year could eventually be viewed as being covered by a certification occurring later in the calendar year. That is no longer the case. Accordingly, we propose to remove and reserve 5 CFR 534.404(e)(2) and 5 CFR 534.404(c)(3)(v) of the SES pay regulations in 5 CFR part 534, subpart D. We propose this approach, as opposed to deletion and revision or re-designation of affected paragraphs, for the administrative convenience of users,

so that paragraph references that previously designated or referred to certain types of pay actions may continue to be used after publication of final regulations to designate or refer to those same types of pay actions in agency documentation.

Preservation of an Established Rate of Basic Pay

We specifically define limits on pay setting upon transfer in proposed 5 CFR 534.509(a). These limits implement the statutory restriction against an individual losing pay when moving from an agency with an applicable certified appraisal system to one without an applicable certified appraisal system. We also specify that an agency may retain an employee's rate of pay above EX–III that has been properly established during service under a certified system in the event that certification expires or is suspended or upon the SL or ST employee's movement to an SL or ST position that is not under a certified system. We consider this an appropriate extension of the principle that Congress does not intend for an employee with a pay rate above EX–III in a certified system to lose pay upon transfer due to the new agency's failure to obtain certification for its system. However, the employee is not eligible for a pay increase until assigned to a position under a certified system or until the employee's rate of basic pay is less than the rate for EX–III.

Off-cycle Pay Increases

OPM is proposing that an agency head or the designee who performs the functions described in 5 CFR 430.404(a)(6) may grant an off-cycle pay increase under proposed 5 CFR 534.510, if warranted. Consistent with the SES pay rules, these regulations would provide that in determining whether an off-cycle pay increase is warranted, the granting official can take into account factors such as the following: (1) An SL or ST employee's exceptionally meritorious accomplishments; (2) the need to offer a pay increase for the employee's assumption of a position that has a greater impact on agency performance; or (3) the need to retain an individual who is critical to the agency's performance, and who otherwise would be likely to leave the agency. We are proposing that an agency must include documentation from other performance management system activities, as needed, and its written procedures to show how such factors were considered in determining the off-cycle pay increase.

Reductions in Pay

An SL or ST employee's rate of basic pay may be reduced subject to adverse action rules in 5 CFR part 752, subpart D; however, an SL or ST employee may be reduced in grade or removed from the Federal service under either 5 CFR part 752, subpart D, or 5 CFR part 432. In 5 CFR 534.508, we are proposing to clarify how pay is to be adjusted when SL or ST employees are reduced in grade under these applicable procedures or move from a position covered by the SL/ST pay system to a lower-level GS position for other reasons. (Pay setting upon movement to a lower-level position in a different pay system (*i.e.,* not under the General Schedule) is governed by the pay-setting rules of that pay system and is not addressed in these proposed regulations.)

SL and ST employees occupy white-collar positions established by reference to GS classification standards (5 CFR 319.203). SL and ST positions were formerly classified in GS–16, 17, and 18 of the GS system. Removal of grade distinctions among SL/ST positions should not obscure the fact that they are white-collar positions placed at a single level above GS–15 by reference to GS classification standards and principles. Though covered by a unique pay system, SL employees remain members of the competitive or excepted service, and ST employees remain members of the competitive service. Their conditions of employment are largely determined by this membership. Removal from coverage under the SL/ST pay system does not require removal from the Federal service. Reduction in grade may enable an agency to retain an accomplished employee in a position better suited to his or her abilities. This is an alternative for the agency and not an entitlement for an SL or ST employee.

We are also proposing in 5 CFR 534.508(d) to allow for an agency and employee to voluntarily agree to a placement that will involve a current or future pay reduction for the employee. We would provide that if an SL or ST employee willingly accepts this pay consequence to facilitate a desired assignment and the agency documents the voluntary nature of the reduction, it will not be subject to 5 CFR part 752, subpart D.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities, because they will apply only to Federal agencies and employees.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

List of Subjects in 5 CFR Part 534

Government employees, Hospitals, Students, and Wages.

U.S. Office of Personnel Management.

John Berry,

Director.

For the reasons stated in the preamble, the U.S. Office of Personnel Management proposes to amend 5 CFR part 534 as follows:

PART 534—PAY UNDER OTHER SYSTEMS

1. Revise the authority citation for part 534 to read as follows:

Authority: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, sec. 1125 of the National Defense Authorization Act for FY 2004, Pub. L. 108–136, 117 Stat. 1638 (5 U.S.C. 5304, 5382, 5383, 7302; 18 U.S.C. 207); and sec. 2 of Pub. L. 110–372, 122 Stat. 4043 (5 U.S.C. 5304, 5307, 5376).

§ 534.404 [Amended]

2. Amend § 534.404 to remove and reserve paragraphs (c)(3)(v) and (e)(2).

3. Revise subpart E to read as follows:

Subpart E—Pay for Senior-Level and Scientific or Professional Positions

Sec.

534.501 Purpose.
534.502 Coverage.
534.503 Definitions.
534.504 Pay range.
534.505 Written procedures.
534.506 Setting a rate of basic pay upon appointment.
534.507 Annual increases in basic pay.
534.508 Reductions in a rate of basic pay.
534.509 Preservation of an established rate of basic pay.
534.510 Off-cycle pay increases.
534.511 Exemption from performance appraisal requirements.

Subpart E—Pay for Senior-Level and Scientific or Professional Positions

§ 534.501 Purpose.

This subpart provides rules for setting and adjusting rates of basic pay for senior-level (SL) and scientific or professional (ST) employees under 5 U.S.C. 5376. Section 5376, as amended by section 2 of the Senior Professional Performance Act of 2008 (Pub. L. 110–372, October 8, 2008), promotes performance-based pay by enabling an agency that attains certification of a performance appraisal system covering senior professionals to fix rates of basic pay for those employees up to the rate

payable for level II of the Executive Schedule. Under 5 U.S.C. 5307(d) and subpart D of part 430 of this chapter, the Office of Personnel Management (OPM), with Office of Management and Budget (OMB) concurrence, grants certification only to a performance appraisal system that, in its design and application, makes meaningful distinctions based upon relative performance. This subpart implements the purpose of the law by providing for pay determinations for SL and ST employees to be based on individual performance, contributions to the agency's performance, or both, as determined through administration of the agency's performance management system(s) for SL and ST employees.

§ 534.502 Coverage.

(a) This subpart implements 5 U.S.C. 5376 and applies to—

(1) Senior-level (SL) positions classified above GS–15 pursuant to 5 U.S.C. 5108; and

(2) Scientific or professional (ST) positions established under 5 U.S.C. 3104.

(b) This subpart does not apply to—

(1) Senior Executive Service positions established under 5 U.S.C. 3132, unless the incumbent of the position declined to convert to the SES and, under § 317.303 of this chapter, remained at grade GS–16, 17, or 18 (now the SL pay system) or under the ST pay system;

(2) Positions in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, Defense Intelligence Executive Service, or Senior Cryptologic Executive Service; or

(3) Positions for which pay is fixed by administrative action and is limited to level IV of the Executive Schedule under 5 U.S.C. 5373.

§ 534.503 Definitions.

In this subpart—

Agency means—

(1) An Executive agency as defined in 5 U.S.C. 105;

(2) The Library of Congress; and

(3) Any other entity that is not part of an Executive agency, for which OPM has approved establishment of one or more scientific or professional positions under 5 U.S.C. 3104.

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Certified means having the certification that OPM, with OMB concurrence, grants under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter only to a performance appraisal system that makes, in its design and application, meaningful distinctions based on relative performance. In this subpart, the term ''certified'' refers to a performance appraisal system that has this certification, including a performance appraisal system for which certification has been reinstated after suspension under § 430.405(h) of this chapter.

Movement means a change of an SL or ST employee from one SL or ST position to a different SL or ST position without a break in service under procedures that meet applicable requirements for staffing positions in the competitive service and excepted service. As used in this subpart, the term ''movement'' applies only to an appointment, not a detail, and is used without reference to the pay consequences of an action. Unless otherwise specified, the term refers to position changes both within and between agencies.

Not certified means lacking the certification that OPM, with OMB concurrence, grants under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter only to a performance appraisal system that makes, in its design and application, meaningful distinctions based on relative performance. In this subpart, the term ''not certified'' refers to a performance appraisal system that does not have this certification, or for which a previously granted certification has expired or is suspended under § 430.405(h) of this chapter.

Off-cycle pay increase means any increase in a senior professional's rate of basic pay that becomes effective on a date other than the date specified in § 534.507(a)(1).

OMB means the Office of Management and Budget.

OPM means the Office of Personnel Management.

Performance management system means the framework of policies and practices that an agency uses to implement performance management, as described in § 430.102 of this chapter. As used in this subpart, the term includes, but is not limited to, those disciplines and activities by which an agency addresses the criteria identified in § 430.404(a)(1) through (9) of this chapter as necessary for certification of an agency's performance appraisal system.

Performance rating means the written, or otherwise recorded, appraisal of performance compared to the SL or ST employee's performance standard(s) for each critical and non-critical element on which there has been an opportunity to perform for a minimum of 90 days. A performance rating may include the assignment of a summary level within a pattern as specified in § 430.208(d) of this chapter.

Rate of basic pay means the rate of pay fixed by law or administrative action for an SL or ST employee under the provisions of 5 U.S.C. 5376 and this subpart before any deductions and exclusive of additional pay of any other kind.

Rating of record means the performance rating prepared at the end of an appraisal period for performance of agency-assigned duties over the entire period and the assignment of a summary level within a pattern as specified in § 430.208(d) of this chapter that has been reviewed and approved in accordance with § 534.505(a).

Scientific or professional (ST) employee means an individual appointed to a position described in § 319.103 and authorized by OPM under § 319.202 of this chapter or otherwise established under 5 U.S.C. 3104.

Senior-level (SL) employee means an individual appointed to a position described in § 319.102 and authorized by OPM under § 319.202 of this chapter.

Senior professional means an SL or ST employee.

Transfer means any movement, as defined in this section, that is a change of a senior professional from an SL or ST position in one agency to an SL or ST position in another agency without a break in service of at least 1 full workday.

§ 534.504 Pay range.

(a) A rate of basic pay under this subpart must be—

(1) Not less than 120 percent of the minimum rate of basic pay payable for GS–15 of the General Schedule, and

(2) Not greater than—

(i) The rate of basic pay payable for level III of the Executive Schedule (EX–III), or

(ii) In the case of an SL or ST employee who is covered by a certified performance appraisal system or whose established rate of basic pay is preserved under § 534.509, the rate of basic pay payable for level II of the Executive Schedule (EX–II).

(b) An agency may not set or adjust the rate of basic pay for an SL or ST employee higher than the maximum in—

(1) Paragraph (a)(2)(i) of this section (*i.e.,* EX–III) when the SL or ST employee is covered by a performance appraisal system that is not certified or when the SL or ST employee is not subject to a performance appraisal system, except as provided in § 534.509; or

(2) Paragraph (a)(2)(ii) of this section (*i.e.,* EX–II) when the SL or ST employee

is covered by a certified performance appraisal system.

§ 534.505 Written procedures.

(a) Each agency with positions subject to this subpart must establish written procedures for setting the rate of basic pay and increasing the rate of basic pay of incumbents of the positions in accordance with law and this subpart. Agencies must provide for transparency in the processes for making pay decisions, while assuring confidentiality. The agency's plan for setting and increasing rates of basic pay must reflect meaningful distinctions among SL and ST employees based on individual performance, contribution to agency performance, or both, and must include—

(1) The criteria that will be used to set and increase a senior professional's rate of basic pay to ensure that individual pay rates or pay increases, as well as their overall distribution within the senior professional pay range, reflect meaningful distinctions within a single performance level (*e.g.,* the higher the employee's relative performance within a rating level, the higher the pay increase), between performance rating levels (*e.g.,* the higher the rating level, the higher the pay increase), or both;

(2) The criteria that will be used to set and increase a senior professional's rate of basic pay at a rate that exceeds the rate for level III of the Executive Schedule if the applicable agency performance appraisal system has been certified under part 430, subpart D of this chapter;

(3) Any system, methods, or criteria the agency uses to establish pay ranges applicable to various SL or ST positions within the pay range that applies under § 534.504(a), consistent with the requirement that pay be determined based upon individual performance, contributions to the agency's performance, or both;

(4) The designation of the authorized agency official(s) who will have the authority to set and adjust rates of basic pay for SL and ST employees, subject to the requirements of paragraph (c) of this section; and

(5) The administrative and management controls that will be applied to assure compliance with applicable statutes, OPM regulations, the agency's written procedures established under this section, the applicable maximum rate of basic pay in § 534.504(a), and, where applicable, the certification requirements set forth in part 430, subpart D of this chapter. In an agency that employs ten or more senior professionals, these controls must include centralized review of ratings assigned under § 430.208 of this chapter and pay actions proposed under § 534.507 by a panel of individuals designated by the agency head to advise on whether—

(i) Ratings of record and performance ratings used to increase basic pay are consistent with performance differentiation as described in § 430.404(a)(8) of this chapter; and

(ii) Proposed rates of basic pay are consistent with pay differentiation as described in § 430.404(a)(9) of this chapter.

(b) Each agency's written procedure must provide that effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. 5303 in the rates of basic pay under the General Schedule, the head of an agency will adjust a senior professional's rate of basic pay under the provisions of § 534.507.

(c) The following actions must be approved by the agency head or by the designee who performs the functions described in § 430.404(a)(6) of this chapter and this approval authority may not be further delegated:

(1) Any pay-setting action under § 534.506 or any pay increase under § 534.507 that results in a rate of basic pay that is within the highest 10 percent of the applicable rate range under § 534.504. A rate of basic pay equal to or above the amount derived using the following rules is considered to be within the highest 10 percent of the applicable pay range (in 2010, $173,685 or above if the applicable system is certified, or $160,725 or above if the applicable system is not certified or performance appraisal does not apply):

(i) Subtract the minimum rate of basic pay from the maximum rate of basic pay for the applicable rate range under § 534.504 (in 2010, $179,700 − $119,554 = $60,146 if the applicable system is certified, or $165,300 − $119,554 = $45,746 if the applicable system is not certified or performance appraisal does not apply);

(ii) Multiply the amount derived in paragraph (b)(1)(i) of this section by .10 (in 2010, $60,146 × .10 = $6,015 if the applicable system is certified, or $45,746 × .10 = $4,575 if the applicable system is not certified or performance appraisal does not apply); and

(iii) Subtract the amount derived in paragraph (b)(1)(ii) of this section from the maximum rate of basic pay applicable under § 534.504 (in 2010, $179,700 − $6,015 = $173,685 if the applicable system is certified, or $165,300 − $4,575 = $160,725 if the applicable system is not certified or performance appraisal does not apply);

(2) Any pay increase under § 534.507 that results in a rate of basic pay more than 10 percent above the SL or ST employee's rate of basic pay as in effect on the last day of the preceding fiscal year or, if the individual was first appointed as an SL or ST employee in the agency after the last day of the preceding fiscal year, more than 10 percent above the rate of basic pay set at the time of that appointment. A rate of basic pay more than 10 percent above the applicable rate of basic pay is considered to be any rate of basic pay that exceeds the amount derived by multiplying the applicable rate of basic pay by a factor of 1.1;

(3) Any pay-setting action under § 534.506(c)(2) that results in a higher rate of basic pay than the senior professional had upon leaving the agency; and

(4) Any off-cycle pay increase under § 534.510.

(d) An agency must keep its written procedures up to date, make them available to OPM upon request and to affected SL and ST employees, and periodically provide training or supplemental guidance to assist SL and ST employees in understanding their application.

(e)(1) The head of an agency may delegate to an Inspector General the authority to set and adjust pay for senior professionals in the Office of the Inspector General, including authority for pay actions described in paragraph (c) of this section.

(2) An agency head who delegates to an Inspector General the authority to set and adjust pay for all senior professionals in the Office of the Inspector General, including all pay actions described in paragraph (c) of this section, may exclude those senior professionals from the count of agency senior professionals for the purpose of determining whether centralized review under paragraph (a)(5) of this section is required.

(3) An Inspector General to whom an agency head delegates authority to set and adjust pay for 10 or more senior professionals in the Office of the Inspector General must provide the centralized review required by paragraph (a)(5) of this section and may use Federal employees from outside the agency for that purpose, including individuals from the Inspector General community.

§ 534.506 Setting a rate of basic pay upon appointment.

(a) An authorized agency official may set the rate of basic pay of an individual

who is not currently an SL or ST appointee of the agency at any rate within the applicable rate range under § 534.504(a) upon appointment to an SL or ST position in the agency, subject to the requirements of this section. In setting a new senior professional's rate of basic pay, an agency must consider the nature and quality of the individual's experience, accomplishments, and any unique skills, qualifications, or competencies the individual possesses as they relate to requirements of the senior professional position and its impact on the agency's performance. Rates of basic pay above the rate for level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule generally are reserved for those newly appointed senior professionals who possess superior leadership, scientific, professional or other competencies necessary to address key program and mission requirements, as determined by the agency as part of its strategic human capital plan.

(b) Consistent with the agency's written procedures and paragraph (a) of this section, an authorized agency official may set the rate of basic pay for an SL or ST employee upon transfer from another agency at any rate of basic pay within the pay range that applies to the SL or ST position under § 534.504(a), except as provided in § 534.509(a).

(c)(1) Consistent with the agency's written procedures and paragraph (a) of this section, except as provided in paragraph (c)(2) of this section, an authorized agency official may set pay upon reappointment of a former SL or ST employee at any rate of basic pay within the pay range that applies to the SL or ST position under § 534.504(a).

(2) If a former agency SL or ST employee is reappointed within 30 days to the same position or a successor position in the same agency, the agency may not give the individual a higher rate of basic pay upon reappointment unless the agency head or the designee who performs the functions described in § 430.404(a)(6) of this chapter determines that a higher rate of basic pay is warranted.

§ 534.507 Annual increases in basic pay.

(a)(1) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. 5303 in the rates of basic pay under the General Schedule, the head of an agency must adjust a senior professional's rate of basic pay under paragraph (b) of this section by an amount he or she considers appropriate, subject to the applicable maximum rate under § 534.504(a), the agency's written procedures under § 534.505, and the provisions of this section. For this purpose, a determination by an authorized agency official to make a zero adjustment in pay after reviewing a senior professional's current rating of record or performance rating is considered to be a pay adjustment.

(2) A pay adjustment under paragraph (a)(1) of this section does not restrict the authority of an agency head to increase pay at other times as authorized under § 534.510, if warranted.

(b)(1) An agency may provide a pay increase to a senior professional only upon a determination by the authorized agency official that the senior professional's performance and/or contributions to agency performance so warrant.

(2) Increases resulting in a rate of basic pay above level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule are reserved for those senior professionals who demonstrate the highest levels of individual performance, make the greatest contributions to the agency's performance, or both, as determined by the agency through the administration of its performance management system.

(3) A pay increase must reflect the agency's judgment concerning the value of the employee's characteristic and continuing service to the agency in the SL or ST position. A single noteworthy contribution that is not characteristic of the employee's continuing performance requirements, individual performance or contributions to the agency's performance should be recognized by an appropriate award under part 451, subpart A of this chapter, or other appropriate authority, rather than by a permanent increase in the rate of basic pay.

(c) An agency must document the basis for each pay increase granted under paragraph (b) by means of—

(1) A current rating of record; or

(2) A performance rating that covers a period of at least 90 days and is assigned in accordance with subpart B of part 430 of this chapter and the centralized review required by § 534.505(a)(5), but only if a rating of record is not available or does not reflect current performance.

(d) Any increase under this section that results in a rate of basic pay above the rate for level III of the Executive Schedule may not be made effective unless—

(1) The rating of record or performance rating used to justify the increase covers a period of at least 90 days of performance during which the applicable performance appraisal system has continuously been certified under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter;

(2) The rating of record or performance rating used to justify the increase becomes final while the applicable performance appraisal system is certified;

(3) The rating and pay increase are reviewed and approved in accordance with § 534.505(a);

(4) The pay increase is approved in accordance with § 534.505(c), as applicable, and the agency's written procedures; and

(5) The pay increase becomes effective while the applicable performance appraisal system is certified.

(e) Upon the initial certification under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter by OPM, with OMB concurrence, of an agency performance appraisal system covering SL or ST employees, OPM may waive the requirement of paragraph (d)(1) of this section. The requirement may be waived only if OPM determines that the agency has, for a period of no less than 90 days prior to certification, consistently applied the same performance appraisal system to covered SL or ST employees in a manner consistent with certification. If OPM waives this requirement, OPM will notify the agency in writing.

(f) Except as required by paragraph (g) of this section, a pay increase under this section may not be provided to an employee—

(1) Who has a current rating of record below Level 3 (Fully Successful or equivalent), as described in § 430.208 of this chapter; or

(2) Who, after receiving a rating of record at Level 3 or above, receives a more recent performance rating that rates performance in a critical element at a level below fully successful, as described in § 430.206(b)(8)(i) of this chapter.

(g) An SL or ST employee whose rate of basic pay would otherwise fall below the minimum rate of the SL and ST pay range under § 534.504(a)(1) must be provided a pay adjustment sufficient to maintain the minimum rate of basic pay.

(h)(1) If the rates of basic pay under the General Schedule are increased under 5 U.S.C. 5303 on the date specified in paragraph (a)(1) of this section and the agency head decides upon a zero adjustment for an SL or ST employee who has a current rating of record or applicable performance rating at level 3 or above, as described in § 430.208 of this chapter, the agency

must communicate the reasons for that decision to the employee in writing.

(2) Paragraph (h)(1) of this section shall not apply to a senior professional with a rate of basic pay described in § 534.505(c)(1) unless—

(i) the rates of basic pay for the Executive Schedule are also increased on the date specified in paragraph (a)(1) of this section, and

(ii) the senior professional has a current rating of record or applicable performance rating at level 4 in an appraisal program that uses summary level pattern G, or at level 5 in an appraisal program that uses summary level pattern H, as described in § 430.208 of this chapter.

(3) Paragraphs (h)(1) and (h)(2) of this section may not be construed to require a pay increase for any senior professional employee.

§ 534.508 Reductions in a rate of basic pay.

(a) Any reduction in a rate of basic pay for an SL or ST employee is subject to part 752, subpart D of this chapter except as otherwise provided in this section.

(b) If an employee is removed from an SL or ST position and placed in a General Schedule position under procedures in part 752, subpart D of this chapter or part 432 of this chapter providing for reduction in grade, or otherwise moves voluntarily or involuntarily to a General Schedule position, the employee is entitled to the minimum rate of basic pay, as defined in § 531.203 of this chapter, for the General Schedule grade unless the agency sets the employee's pay at a higher rate under—

(1) The maximum payable rate rule in § 531.221 of this chapter, if applicable;

(2) The superior qualifications and special needs pay-setting authority in § 531.212 of this chapter, if applicable; or

(3) The pay retention rules in part 536, subpart C of this chapter, if applicable.

(c) An agency may reduce an SL or ST employee's rate of basic pay, subject to part 752, subpart D of this chapter, upon movement to a different SL or ST position within the agency. If an SL or ST employee elects to accept a reduction in pay to facilitate a reassignment and the agency documents the voluntary nature of the action, the resulting pay reduction is not subject to part 752, subpart D of this chapter.

(d) If an SL or ST employee elects to accept a temporary increase in a rate of basic pay upon movement to another SL or ST position with the understanding that the employee will be returned to his or her former rate of basic pay when the agency terminates the assignment and the agency documents the voluntary nature of the action, the resulting reduction to the former rate of basic pay (or to a higher rate of basic pay determined under this subpart that is within the pay range applicable to the SL or ST position under § 534.504(a)) is not subject to part 752, subpart D of this chapter.

(e) A reduction in the rate of basic pay of an SL or ST employee under § 534.506(b) upon transfer is considered voluntary upon the employee's acceptance of the appointment and is not subject to part 752, subpart D of this chapter, except that an SL or ST employee's rate of basic pay may not be reduced upon transfer under circumstances described in § 534.509(a). A reduction in the rate of basic pay of an SL or ST employee upon a transfer of function under part 351, subpart C of this chapter from another agency is subject to part 752, subpart D of this chapter, unless otherwise provided by statute.

§ 534.509 Preservation of an established rate of basic pay.

(a) An SL or ST employee whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay as a result of transfer to an SL or ST position in another agency where the maximum rate of basic pay for the applicable SL or ST rate range is equal to the rate for level III of the Executive Schedule.

(b) An SL or ST employee whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay because his or her agency's applicable performance appraisal system certification expires or is suspended under § 430.405(h) of this chapter. See § 530.203(g) and (h) of this chapter for treatment of the aggregate pay limit when certification status changes during the calendar year.

(c) An agency may continue an SL or ST employee's rate of basic pay above the rate for level III of the Executive Schedule upon that employee's movement within the agency to an SL or ST position that is not under a certified performance appraisal system. Pay may be reduced upon the movement only as provided in § 534.508.

(d) If an agency grants a temporary pay increase under conditions described in § 534.508(d) to an SL or ST employee subject to a certified performance appraisal system who, prior to the temporary pay increase, has a rate of basic pay above the rate for level III of the Executive Schedule, the agency may return the employee to an SL or ST position that is not subject to a certified performance appraisal system when the temporary assignment ends and set the SL or ST employee's rate of basic pay at the rate in effect immediately before the temporary pay increase.

(e) When a rate of basic pay that is higher than level III of the Executive Schedule is preserved under a provision of this section, the SL or ST employee will continue to receive his or her current rate of basic pay and is not eligible for a pay increase until he or she is assigned to an SL or ST position covered by a certified performance appraisal system or his or her rate of basic pay is less than the rate for level III of the Executive Schedule.

(f) An agency that is otherwise subject to the limitation in § 534.504(a)(2)(i) with respect to an SL or ST position occupied by an SL or ST employee whose rate of basic pay is authorized to be preserved under paragraph (a), (b), (c), or (d) of this section may set that employee's rate of basic pay above EX–III only at the level required to preserve the applicable rate.

(g) Preservation of a rate of basic pay under this section does not preclude a subsequent reduction in pay as provided in § 534.508.

§ 534.510 Off-cycle pay increases.

(a) An authorized agency official may provide an off-cycle pay increase to a senior professional if, and only if, the agency head or the designee who performs the functions identified in § 430.404(a)(6) of this chapter determines an off cycle pay increase is warranted and approves the amount of the increase subject to the requirements of this section and the agency's written procedures established under § 534.505. The authority to approve an off-cycle pay increase under this section may not be further delegated.

(b) Except as provided in paragraph (d) of this section, an off-cycle pay increase must be supported by factors that distinguish the level of the senior professional's performance and/or contributions to agency performance from that of his or her peers, as applicable, and from that sufficiently rewarded through the annual pay adjustment. In assessing the warrant for an off-cycle pay increase, the approving official may consider such factors as—

(1) A senior professional's exceptionally meritorious accomplishments that contribute significantly to the agency's performance;

(2) The need to offer a pay increase to reassign a senior professional to a

position that has a substantially greater impact on agency performance; and

(3) The need to retain a senior professional whose contributions are critical to the agency and who is likely to leave the agency in the absence of a pay increase.

(c) Each off-cycle pay increase that is based upon such factors as are described in paragraphs (b)(1) through (3) of this section must be documented in accordance with § 534.507(b) through (e), except that the agency must also provide information to explain how each applicable factor was considered in determining the pay increase. This information may be derived from the agency's written pay procedures established under § 534.505, agency performance management system activities, or other sources the agency deems useful for this purpose.

(d) If the maximum rate of basic pay applicable to an agency's senior professionals increases during the one year period following the annual pay adjustment under § 534.507(a)(1) for reasons other than a change in the certification status of an applicable performance appraisal system, the agency head or the designee who performs the functions identified in § 430.404(a)(6) of this chapter may consider whether, and to what extent, an additional pay increase may be warranted for a senior professional based on the same criteria used in determining his or her annual pay increase. However, if the increase in maximum rate of basic pay is due to a change in the certification status of an applicable performance appraisal system, the requirements of paragraphs (a), (b), and (c) of this section apply.

(e) An off-cycle pay increase granted under this section will be effective prospectively, not retroactively.

§ 534.511 Exemption from performance appraisal requirements.

(a) An agency responsible for setting and adjusting rates of basic pay for SL or ST employees or positions excluded from performance appraisal by or under statute is, with respect to those employees or positions, exempt from any provision of this subpart to the extent that it makes a pay determination contingent upon performance appraisal, including—

(1) Section 534.505(a)(1), (2) and (3) to the extent these paragraphs require that an agency's plan for setting and increasing rates of basic pay reflect meaningful distinctions among SL and ST employees based upon individual performance and include criteria that ensure individuals with the highest levels of individual performance, or the greatest contributions to agency performance, or both receive the highest pay increases. The agency must still provide written procedures for setting and adjusting rates of pay for covered SL and ST employees that specify criteria that will be applied consistent with applicable law. The remaining provisions of § 534.505 apply, except for references in § 534.505(a)(5) to compliance with certification requirements, centralized review of ratings and pay actions, performance differentiation as described in § 430.404(a)(8) of this chapter, and pay differentiation as described in § 430.404(a)(9) of this chapter;

(2) Section 534.507(b), (c), (d), (e), and (f). The agency must still document in writing the basis for each pay increase under § 534.507 in accordance with criteria specified in the agency's written procedures under § 534.505(a); and

(3) Section 534.510(b) and (c). The agency must still document in writing the basis for each off-cycle pay increase under § 534.510 in accordance with criteria specified in the agency's written procedures under § 534.505(a).

(b) Except as specified in paragraph (a) of this section, an agency responsible for setting and adjusting rates of basic pay for SL or ST employees excluded from performance appraisal by or under statute is subject to the requirements of this subpart with respect to those employees.

(c) The maximum rate of basic pay for an SL or ST employee or position not subject to performance appraisal is the maximum rate described in § 534.504(a)(2)(i). An agency head who uses the exemption in paragraph (a) of this section to set the rate of basic pay for SL or ST employees who are not subject to performance appraisal may not certify that those employees are covered by a performance appraisal system meeting the certification criteria established in part 430, subpart D of this chapter for purposes of authorizing rates of basic pay above the rate for level III of the Executive Schedule.

(d) Notwithstanding paragraph (c) of this section, an agency responsible for setting and adjusting rates of basic pay for SL or ST employees or positions excluded from performance appraisal by or under statute is subject to § 534.509(a) when setting a rate of basic pay for an SL or ST employee upon transfer to such a position. The agency may also apply § 534.509(c) upon movement of an SL or ST employee whose rate of basic pay was initially set under § 534.509(a) or § 534.509(c) to another SL or ST position that is excluded from performance appraisal. Pay may be reduced upon the movement only as provided in § 534.508. In either case, the employee will not be eligible for a pay increase until he or she is appointed to an SL or ST position that is subject to a certified performance appraisal system or until his or her rate of basic pay is less than the rate for level III of the Executive Schedule.

[FR Doc. 2011–32939 Filed 12–22–11; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 27 and 28

[Doc. # AMS–CN–11–0066]

RIN 0581–AD19

Revision of Cotton Classification Procedures for Determining Cotton Leaf Grade

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) is proposing to revise the procedure for determining the official leaf grade for Upland and Pima cotton. The leaf grade is a part of the official classification which denotes cotton fiber quality used in cotton marketing and manufacturing of cotton products. Currently, the leaf grade is determined by visual examination and comparison to the Official Cotton Standards by qualified cotton classers. This proposed revision would replace the classer's leaf determination with the instrument leaf measurement made by the High Volume Instrument (HVI) system used in official cotton classification for Upland Cotton since 1991.

DATES: Comments must be received on or before January 9, 2012.

ADDRESSES: Interested persons may comment on the proposed rule using the following procedures:

Internet: *http://www.regulations.gov.*

Mail: Darryl Earnest, Deputy Administrator, Cotton & Tobacco Programs, AMS, USDA, 3275 Appling Road, Memphis, TN 38133. Comments should be submitted in triplicate. All comments should reference the document number, date, and page number of this issue of the **Federal Register**.

All comments will be available for public inspection at Cotton & Tobacco Program, AMS, USDA, 3275 Appling Road, Memphis, TN 38133 during regular business hours. A copy of this